Supreme Court, U. S.
FILED
AUG 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-210

THOMAS MONROE WALTON,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS
OF THE STATE OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

Petitioner, Thomas Monroe Walton, prays that a Writ of Certiorari issue to review the order of the Court of Appeals of Maryland entered in the above-entitled case on May 8, 1978, and mandate entered on June 7, 1978, which dismissed the Writ of Ceritiorari to the Court of Special Appeals of Maryland as improvidently granted thereby allowing the Petitioner's conviction to stand.

OPINIONS BELOW

No opinion was filed by the Court of Appeals of Maryland in this case. The Order and Mandate of the Court of Appeals dismissing the Petitioner's Petition for Writ of Certiorari as improvidently granted appeared in Appendix B. The opinion of the Court of Special Appeals affirming the Petitioner's conviction appears in Appendix A.

JURISDICTION

The Court of Special Appeals of Maryland affirmed the Petitioner's conviction in an opinion filed on October 4, 1977. (Appendix A hereto). The Court of Appeals of Maryland dismissed the Writs of Certiorari in an Order filed on May 8, 1978, declaring the Petition as having been improvidently granted (Appendix B hereto). The Mandate was subsequently filed on June 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

The federal question, involving the applicability of 18 U.S.C. 2510-2520 to state eavesdrop law, was raised by Appellant prior to trial (Tr. p. 21) and was fully briefed and argued by both parties before both the Court of Special Appeals of Maryland and the Court of Appeals of Maryland.

QUESTION PRESENTED

Must evidence, and all fruits derived therefrom, obtained as a result of a court order authorizing the use of electronic equipment issued pursuant to a State statute, and more specifically an Ann. Code of Md., Art. 27, Sec. 125A(b), and the application and supporting affidavits filed incident thereto,

be suppressed when such papers are in clear violation of 18 U.S.C. 2510-2520?

TEXT OF STATUTES INVOLVED

ANNOTATED CODE OF MARYLAND

Art. 27, § 125A

Evidence held sufficient to convict. – See Matthews v. State, 228 Md. 401, 179 A.2d 892 (1962).

Where the State's evidence justified a finding that the defendant violated the gambling statutes by taking bets on horse races many times on the several days charged in the indictment, and that he was keeping and maintaining the place where the violations occurred in the eyes of the law, the trial judge was warranted in finding him guilty of keeping and maintaining a disorderly house. Curley v. State, 215 Md. 382, 137 A.2c 640 (1958).

Cited in Beard v. State, 74 Md. 130, 21 A. 700 (1891); Jackson v. State, 176 Md. 399, 5 A.2d 282 (1939);Tuminello v. State, 7Md.App.380, 256 A.2d 342 (1969); Tuminello v. State, 10 Md. App. 612, 272 A.2d 77 (1971); Rosenberg v. State, 12 Md. App. 20, 276 A.2d 708 (1971).

ELECTRONIC DEVICES

§ 125A. Use to overhear or record private conversation.

(a) *Use without knowledge or consented prohibited.* – It is unlawful for any person in ths State to use any electronic device or other device or equipment of any type whatsoever

in such manner as to overhear or record any part of the conversation or words spoken to or by any person in private conversation without the knowledge or consent, expressed or implied, of that other person.

(b) *Prevention of crime or apprehension of criminal – Petition for ex parte order authorizing use.* – However, if it shall papear to a duly authorized public law enforcement officer of this State that a crime has been, or is being, or is about to be committed, and that the use of such electronic devices are required to prevent the commission of the said crime, or to apprehend the persons who shall have committed it, then the law enforcement officer or officers shall submit to the State's attorney of the county or of Baltimore City the evidence upon which the said law enforcement officer bases his contention that an ex parte order authorizing the use of the said electronic devices is necessary; and if it shall appear to the said State's attorney that there are reasonable grounds to believe that a crime has been committed or is being committed or may be committed then the said State's attorney shall apply to any of the judges of the circuit court of the county or of the Supreme Bench of Baltimore City, by means of a former ex parte petition for the issuance of an order authorizing the use of the said electronic devices or equipment, and shall make oath or affirm in the said petition that there is probable cause to believe that a crime may be, or is being, or has been committed and shall state the facts upon which said probable cause is based, and further, that the use of the said electronic devices or equipment is necessary in order to prevent the commission of, or to secure evidence of the commission of such crime. In such case the affiant shall identify, with reasonable particularity, the device or devices to be used, the place or places where they are to be used, the person or persons whose conversation is to be intercepted, the crime or crimes which are suspected to have

been, or about to be committed, and that the evidence thus obtained will be used solely in connection with an investigation or prosecution of the said crimes before any such ex parte order shall be issued. The applicant must state whether any prior application has been made in the same matter and if such prior application exists the applicant shall disclose the present status thereof.

(c) *Same–Issuance of order; duration; disposition.* – The judge of the circuit court of the county or of the Supreme Bench of Baltimore City shall satisfy himself that the facts stated in the petition indicate that there is probable cause for the issuance of the said order. Such ex parte order shall be effective for the time specified in the order, but for not more than thirty days unless extended or renewed by the judge, upon proper petition meeting the same requirements as the original petition. Any ex part order so issued shall be retained by the applicant as authority for the use of the electronic device or equipment therein set out and the interception of the conversation sought to be intercepted. A true copy of such order, together with any exhibits submitted with the petition shall be sealed and filed with the clerk of the court in which the order is issued, at the time of its issuance, provided, however, that such order shall be available to persons in interest after arrest, upon order of the court. (1959, ch. 706).

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving

the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of–

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving brankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing

such interception, or any conspiracy to commit any of the foregoing offenses.
Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 216.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of thenature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the same action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that–

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning the offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonable appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify–

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) Nor order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer then the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorzation to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that–

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extension thereof, such recordings shall be made

available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be whereever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of–

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress

the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that–

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application tht the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.
Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218.

STATEMENT

Petitioner was convicted of conspiracy to commit murder after a trial by jury on September 20-24, 1976, and was subsequently sentenced to a term of ten years to the Maryland Department of Correction on January 25, 1977.

Petitioner was a neighbor of his co-defendant, Lyn Jane Silk, and the two of them had known each other's spouses for several years. In August of 1975, the Petitioner informed a friend of his, William Monroe, that Silk had mentioned to him that she would like to see her husband, Harry Silk, dead. Monroe passed this information along to the police who urged Monroe to contact the Petitioner again in order to arrange a meeting between Monroe and Silk to discuss her alleged desire to see her husband killed, and to make arrangements to pay for a hired "hit" man from Philadelphia.

Once the arrangements for this meeting were finalized, the police, through the affidavits of Monroe, and Detectives Freburger and Elwood of the Baltimore County Police Department, obtained a Court Order authorizing them to place a recording device on Monroe's body so that they could monitor the conversation during this private meeting.

The meeting was held in the Petitioner's house in Baltimore County on August 7, 1975. Detectives Freburger and Elwood remained outside the house in a police van and recorded the private conversation, while another officer, Detective Willis, waited in Monroe's car, and posed as the "hit" man from Philadelphia. Other officers were deployed in various positions around the house and maintained a constant surveillance.

Immediately following the break-up of this meeting, the Petitioner was arrested as he walked from his home and was taken to Baltimore County Police Headquarters where a statement was elicited from him early the next morning.

The Petitioner was charged with conspiracy to commit murder, and solicitation to murder, but his motion to acquit for lack of sufficient evidence on the solicitation charge was subsequently granted and he was convicted on only the conspiracy count.

REASONS FOR GRANTING THE WRIT

The Writ should be granted so that this Court may resolve important questions concerning the applicability of the Federal Wiretap Law, 18 U.S.C. 2510-2520, to the States where a State statute mandates the application for and issuance of a court order prior to the utilization of any method of electronic surveillance. This Court has never decided this precise question presented.

The Petitioner was convicted almost entirely on the basis of a conversation he had with his alleged co-conspirator, Lyn Jane Silk, and a friend and information, William Monroe. During this conversation, the "hit" man was set up on Silk's husband, and Monroe, who had previously informed the Baltimore County Police of the purpose of this meeting, was wired with a "body tape" so that the conversation could be recorded while the meeting area itself was kept under constant visual surveillance. The admissability of the "body tape" was objected to at trial, even though it was clearly constitutionally permissible as Monroe was a participant in the meeting. ***United States v. White***, 401 U.S. 745 (1971). That, though, is not the

issue as here the Court is faced with a State law, Ann. Code of Md., Art. 27, Sec. 125A, which required law enforcement officials to secure a warrant prior to the use of *any* type of electronic surveillance, whether it be the participant type of monitoring used in this instance, or the traditional wiretap.

The question presented this Court concerns the scope of Title III, and more specifically, 18 U.S.C. 2516 (2), and its applicability to State law.

The Petitioner contends that 18 U.S.C. 2516(a), which states that a prosecuting attorney, authorized by State statute to apply for a judicial order authorizing electronic surveillance, may apply to a State court judge for such order and that that order may be issued only if "in conformity with Section 2518 of this chapter and with the applicable state statute", is clear on its face in requiring judicial orders authorized under a State statute to meet procedural requirements set forth in Sec. 2518.

The Maryland Courts have, in the past, recognized the clarity of the Federal mandate as set forth in Title III. In *State v. Siegel*, 266 Md. 256, 292, 292 A. 2d 86, 95 (1972), the Maryland Court of Appeals stated that the Federal act was not self-executing but required a State statute in order to give it effect and that Ann. Code of Md., Art. 27, Sec. 125A, was just such an applicable State statute. In a later decision, that same an applicable State statute. In a later decision, that same Court reiterated its stance that Sec. 125A was an applicable state statute under 18 U.S.C. 2516(2), and therefore, "any electronic surveillance may be conducted only when done in accord with the rigid constraints imposed by 18 U.S.C. Sec. 2510-2520. *Carter v. State*, 274 Md. 411, 429, 377 A.2d 415, 425 (1975).

There is little doubt but that Sec. 125A clamps limitations on the use of electronic equipment beyond the prohibitions set forth in Title III and is, therefore, a more restrictive law but this does not toll the death knell of the Federal act's applicability to the instant case.

Section 2516(2) is clear in stating that State laws dealing with electronic surveillance, and which authorize the application for and issuance of a Court order, are controlled by the federal statute, and more particularly by the procedural dictates of that statute as outlined in Sec. 2518.

The Federal act's applicability to the present situation then mandates an inquiry into whether the application and supporting affidavits for the Court order authorizing the electronic surveillance, as well as the Court order itself, were insufficient to stand up to the procedural requirements of Sec. 2518.

The requirements set forth in 18 U.S.C. Sec. 2518(1)(c) call for each application for a judicial order authorizing the interception of wire or oral communication to include a full and complete statement as to why other means of investigation have not been tried or appear likely to fail. Further, 18 U.S.C. 2518(3)(c) allows a judge to issue said order only after determining, on the basis of the facts submitted by the applicant, that normal investigative techniques have failed and that other such means appear likely to fail if tried, or may be too dangerous.

Only a cursory examination of the supporting affidavits in the case at bar is necessary to conclude that both of these sections have been violated. The supporting affidavits involved merely recite the conclusory statement that other means of investigation would not succeed. Neither affidavit presents

either a scintilla of evidence or a single fact that would enable the ordering judge to make his own independent determination as to why other means of investigation appear likely to fail. (Appendix C & D hereto). It is not suggested that every possible means of investigation should be exhausted prior to resorting to electronic surveillance, but merely that the police weigh the alternatives and present to the ordering judge or magistrate specific facts why electronic surveillance, and the resultant imposition on personal liberties, is the proper investigative technique. *United States v. Curseri,* F.Supp. 607 (D. of Md., 1974). It is the Petitioner's contention that such facts are totally absent from the supporting papers in this case, and therefore, contra to Sec. 2518(1)(c) and (3)(c), the ordering judge was unable to make any semblance of an independent determination.

The next and final flaw in the State's chain of evidence is the Court order issued by Judge Land. 18 U.S.C. Sec. 2518(5) provides that no order may authorize the interception of wire or oral communications without, inter alia, containing a provision that the authorization to intercept shall be executed as soon as practicable. The order in the instant case violates this provision in its failure to contain such an order. (Appendix E hereto).

Title III provides its own remedy for such blatant and repeated violations of its procedural dictates in 18 U.S.C. 2518(10) which requires the contents of an illegally recorded conversation to be suppressed on Motion by an aggrieved person. Sec. 2518(10) does not predicate its remedy on a constitutional violation, and this Court has recognized that the sanctions imposed by that Section apply to any violation of the statutory requirements set forth in Sec. 2510-2520, even if

these violations are purely statutory. *United States v. Giordano,* 416 U.S. 505 (1974).

SUMMARY

The sole basis of the Petitioner's conviction is evidence procured by means of electronic surveillance initiated pursuant to a State statute which is clearly more restrictive than Title III. The fact that the State statute is more constricting than the Federal act does not excempt it from the procedural requirements set forth in 18 U.S.C. 2518, as Sec. 2516(2) requires all Court orders authorized to issue by State statute by application of a prosecuting attorney to be in conformity with both Sec. 2518 and the applicable State statute.

As the order and supporting affidavits in this case were issued pursuant to an applicable state statute under Sec. 2516 (2), their obvious failures to comply with Sec. 2518(1)(c), (3)(c), and (5) require that, according to Sec. 2518(10), all evidence derived therefrom be suppressed.

CONCLUSION

The Writ should be granted to hear and determine the question of whether 18 U.S.C. 2510-2520 requires all applicable State statutes under Sec. 2516(2) dealing with electronic surveillance to be in conformity with the procedural dictates of the Federal act as embodies in Sec. 2518, and if so, whether a violation of these dictates requires suppression of all evidence derived therefrom under Sec. 2518(10).

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

NO. 103

SEPTEMBER TERM, 1977

THOMAS MONROE WALTON
v.
STATE OF MARYLAND

Powers,*
Melvin,
Mason,
JJ.

PER CURIAM

Filed: October 24, 1977

*Powers, J. participated in the hearing of this case and the decision, but retired before it was filed

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On September 24, 1976, Thomas M. Walton (appellant) was found guilty by a jury in the Circuit Court for Baltimore County (Buchanan, J. presiding) of conspiracy to commit murder. He now presents four questions for our review:

"1. Does the failure of the court order to comply with the strict procedures enunciated in 18 U.S.C. Sec. 2518 (5), require suppression of the tape recording and any fruits derived therefrom as mandated by 18 U.S.C. Sec. 2518 (10)?

2. Does the failure of the affidavits supporting the court order to comply with 18 U.S.C. Sec. 2518 (1) (c) and (3) (c) require suppression of the tape recording and any fruits derived therefrom as mandated by 18 U.S.C. Sec. 2518 (10)?

3. Is the State's inability to adequately establish the reliability and trustworthiness of the tape in question fatal to their admissibility for use at trial?

4. Did the State fail to present sufficient evidence to establish a criminal conspiracy through their lack of proof of a specific criminal intent on the part of the Appellant?"

The "Body Tap"

On August 7, 1975, Officer Douglas C. Freburger of the Baltimore County Police Department placed a body transmitter on the person of William W. Monroe. Officer Freburger testified that this was done with the consent of Monroe and pursuant to an order of court. After the transmitter was placed on Monroe's body, Monroe went to appellant's residence at 31 Solar Circle in Baltimore County, Maryland, and there met with appellant and a Lyn J. Silk. Officer Freburger waited with another police offer in a vehicle parked approximately 70 to 80 feet from 31 Solar Circle and recorded the conversation that took place among Monroe, Silk and appellant, as transmitted via the "body tap" on Monroe. This recording was received in evidence as a State's exhibit and was played

to the jury. Appellant contends that the court order authorizing the "body tap" and the affidavits supporting the order did not comply with 18 U.S.C. § 2518 (5) and 18 U.S.C. §§ 2518 (1) (c) and (3) (c), respectively, and, therfore, that the tape recording of the conversation should have been suppressed.

Even assuming the court order and the affidavits in support thereof did not comply with the requirements of 18 U.S.C. §§ 2518 (5), 2518 (1) (c) and 2518 (3) (c), it will avail appellant nothing. As we stated in *Pennington v. State*, 19 Md. App. 253, 274, 310 A. 2d 817 (1973), *cert. denied*, 271 Md. 742 (1974), (*cert. denied* 419 U.S. 1019 (1974):

> "The federal act expressly exempts consensual and participant monitoring by law enforcement agents from the general prohibitions against surveillance without prior judicial authorization and permits the fruits to be received as evidence. Section 2511 (2) (c) prescribes:
>
> > 'It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.'
>
> Section 2515 prohibits the receipt of intercepted communications in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof only if the disclosure of that information would be in violation of this chap-

ter. Thus, the communications here could properly be received in evidence because there was no prohibited use of electronic devices involved, the utilization as here of such devices being within the exemption spelled out in § 2511 (2) (c)."

See also Reed v. State, 35 Md. App. 472, 487, 372 A. 2d 243 (1977), *cert. granted on other grounds*, Md. (1977).

In the instant case it is clear that Monroe consented to the "body tap". Thus, "the interception clearly falls within the exception spelled out in Title 18 U.S.C., § 2511 (2) (c)". *Id.* at 487. The federal act does not apply to this case.

We need not consider whether the order and affidavits complied with the requirements of Md. Ann. Code, Art. 27, § 125 A (1976 repl. vol.) for, as we stated in *Pennington v. State*, *supra*, at 278:

> "The [Maryland] statute contains no provision for the exclusion of evidence obtained in violation of its provisions as is spelled out in the wiretapping laws, Code, Art. 36, § 97 [sic] [should be Art. 35, § 97] and the federal act, 18 U.S.C., §§ 2515 and 2518 (10) (a). We read no such sanction into the electronic devices statute in the absence of any indication of legislative intent to that end."

See also Reed v. State, *supra* at 488.

As we stated in *Reed v. State*, *supra*, at 489:

> While it is conceivable, but unlikely that [Officer Freburger] could be prosecuted for violation

> of Md. Ann. Code Art. 27, § 125 A, that occurrence would not affect the introduction into evidence of the recordings which were properly admitted."

The Recording

Appellant next contends that the State failed to establish the reliability and trustworthiness of the tape recording and that it therefore should have been excluded. He specifically contends that Officer Freburger was not competent to operate the recording device, and that there was no showing that changes, addition or deletions had not been made. *See United States v. McKeever*, 169 F. Supp. 426 (S.D.N.Y. 1958), *rev'd. other grounds*, 271 F. 2d 669 (2d Cir. 1959). *See generally* Annot., *Admissibility of Inaudible Sound Recording*, 57 A.L.R. 3d, 746 751; Annot., *Sound Recordings in Evidence*, 58 A.L.R. 2d 1024; 29 Am. Jur. 2d, Evidence, § 436; McCormick, *Evidence*, 534 (2d ed. 1972). We find both contentions to be without merit.

Officer Freburger testified that he was trained in the use of electronic equipment for interception and overhearing of oral conversations at the United States Army Intelligence School in Fort Holabird; that he had used similar equipment (body transmitters) on other officers in undercover situations; and that he had become completely familiar with the equipment used in the instant case prior to using it on August 7, 1975. We believe there was a sufficient showing that Officer Freburger was competent to operate the recording device.

We also conclude that there was a sufficient showing that the tape recording was not altered. Officer Freburger testified that he kept the tape in his possession until it was sealed by Judge Land and placed in the property room of the

Baltimore County Police Department. He further testified that he never altered the tape in any manner; that to his knowledge it was never altered by anyone else; and, that the tape was still as correct and complete as it was when he made it on August 7, 1975. We find no abuse of discretion by the trial judge in admitting the tape recording into evidence.

Sufficiency of the Evidence

Appellant finally contends that there was insufficient evidence to convict him of conspiracy to commit murder. in *Quaglione v. State*, 15 Md. App. 571, 578-79, 292 A. 2d 785 (1972) we discussed the law of conspiracy as follows:

> "In defining the common law crime of conspiracy, this Court said in *Wilson, Valentine & Nutter v. State*, 8 Md. App. 653 at page 671:
>
> > ' * * * Conspiracy is a combination by two or more persons to accomplish a criminal act by criminal or unlawful means. The gist of conspiracy is unlawful combination and no further overt act is required to constitute it. * * *
>
> "*See also Jones v. State*, 8 Md. App. 370; *Harper v. State*, 6 Md. App. 1; *Williams and Mcclelland v. State*, 5 Md. App. 450. In speaking of the proof necessary to establish a *combination* under the definition of conspiracy, this Court speaking through Chief Judge Murphy in *Silbert v. State*, 12 Md. App. 516 said at page 528:
>
> > ' * * * [T]o establish a conspiracy, it is not necessary that there be any formal

> agreement manifested by formal words, written or spoken; it is enough if the parties tacitly come to an understanding in regard to the unlawful purpose and this may be inferred from sufficiently significant curcumstances. * * * "

Applying these principles to the case at bar, we believe there was ample evidence from which the jury could have concluded that "the parties tacitly [came] to an understanding in regard to the unlawful purpose". This is enough to sustain appellant's conviction.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

APPENDIX B

IN THE COURT OF APPEALS OF MARYLAND
Noes. 137 and 138
SEPTEMBER TERM, 1977

No. 137

THOMAS MONROE WALTON

v.

STATE OF MARYLAND

*****

No. 138

LYN JAYNE SILK

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Digges
Levine
Eldridge
Orth
Cole
JJ.

ORDER

Filed: May 8, 1978

The petitions for certiorari not having disclosed that the pertinent Maryland statute, controlling in these cases, Maryland Code (1957, 1976 Repl. Vol.). Article 27, § 125A, had been repealed by Chapter 692 of the Acts of 1977, effective July 1, 1977; and

The State having filed no answer in opposition to the petitions for a writ of certiorari pointing out the fact that § 125A had been repelaed; and

It appearing, in view of the repeal of § 125A, that these cases do not involve the public interest within the contemplation of § 12-203 of the Courts and Judicial Proceedings Article; therefore, it is this 8th day of May, 1978.

ORDERED, by the Court of Appeals of Maryland, that the writs of certiorari be, and they are hereby, dismissed, petitions having been improvidently granted; and it is further

ORDERED that the State of Maryland shall pay all costs in these proceedings.

/s/ Robert C. Murphy

Chief Judge

IN THE COURT OF APPEALS OF MARYLAND
No. 137
SEPTEMBER TERM, 1977

THOMAS MONROE WALTON

v.

STATE OF MARYLAND

MANDATE

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS the case of *Thomas Monroe Walton v. State of Maryland* came before you and wherein the judgment of the said Court of Special Appeals of Maryland was duly entered on the twenty-fourth day of October, 1977 as appears from the transcript of the record of the said Court of Special Appeals of Maryland which was brought into the Court of Appeals of Maryland by virtue of a writ of certiorari dated January 4, 1978; and

WHEREAS in the September Term, 1977 the said cause came on to be heard before the Court of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordered and adjudged on May 8, 1978 by this Court that the writ of certiorari be dismissed, petition having been improvidently granted; State of Maryland to pay costs in these proceedings.

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause in conformity with the judgment of this Court above stated as accord with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS the Honorable Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland this seventh day of June, 1978.

/s/ James H. Norris, Jr.

Clerk
Court of Appeals of Maryland

Costs:

Petition filing fee	$ 20.00
Appellant's brief	Not supplied
Appellee's brief	$ 47.50

APPENDIX C

AFFIDAVIT

Your Affiant, Detective Richard J. Ellwood, Jr., is a duly constituted member of the Baltimore City Police Department and has served on the Police Force of Baltimore City for approximately eleven (11) years. Your Affiant has been assigned to the Baltimore City Police Department Crimes Against Persons Section since January, 1973. Prior to assuming this position, your Affiant was assigned to the Patrol Division and Vice Division of the Baltimore City Police Department for approximately eight and one-half (8½) years. Your Affiant has attended numerous in-service training sessions and schools since joining the Baltimore City Police Department and has participated in the Frances Glessner Lee Homicide Seminar which was held at the Baltimore City Medical Examiner's Office in March, 1975. Your Affiant, since being a member of the Crimes Against Persons Unit has participated in approximately fifty (50) homicide investigations.

On August 6, 1975, your Affiant was assigned to investigate the Conspiracy to commit homicide of one Harry J. Silk, Jr. Your Affiant was advised by the Internal Investigation Division of the Baltimore City Police Department that one William W. Monroe had information that a contract had been placed to kill an unnamed Baltimore City Police Officer. Your Affiant learned from the said William W. Monroe that he (Monroe) had been advised by one Thomas Walton that an unnamed female was willing to pay a substantial amount of money in order to have an unnamed Police Officer murdered.

Mr. Monroe further stated to your Affiant that he had been told by the said Thomas Walton that the unnamed female was the wife of the unnamed Police Officer and further, she wanted the murder to appear as if the unnamed Police Officer has been killed in the line of duty.

Acting on the instructions of your Affiant, and in the presence of your Affiant, the said William W. Monroe, after numerous attempts to contact Thomas Walton, did at approximately 9:35 P.M., August 6, 1975, call telephone number 296-7685 and spoke to Thomas Walton.

Your Affiant listened to the entire contents of the said telephone conversation on an extension telephone in the offices of the Baltimore City Police Department, Homicide Unit.

Your Affiant, prior to this investigation, knew Thomas Walton and had previously arrested him (Walton) for narcotics violations.

Your Affiant, while listening to the conversations, recognized the voice of Thomas Monroe Walton from the prior contacts.

Your Affiant heard William W. Monroe ask Thomas Walton if the unnamed female was still interested in having her husband murdered and further, if he (Walton) still was attempting to have Monroe secure a person willing to commit the murder. Walton replied that the female was interested in the murder being committed and was willing to pay five thousand dollars ($5,000.00) to the person who committed the murder plus giving the person who committed the murder her "Corvette." Monroe told Walton that he had forgotten

the unnamed female's name and Walton told him that the unnamed female's name was Lyn Silk. Walton, during the course of the conversation, indicated to Monroe that the said Lyn Silk would collect insurance benefits from her husband being killed in the line of duty and that he (Walton) would also attempt to obtain an additional five thousand dollars ($5,000.00) from her for his participation in arranging this murder. Walton then instructed Monroe to come to his house at 31 Solar Circle on August 7, 1975 at approximately 5:30 P.M., at which time he would produce the said Lyn Silk and arrange for the final details for the murder of her husband, Harry J. Silk, Jr.

Your Affiant, armed with this information, checked the personnel files of the Baltimore City Police Department and ascertained that there was - in fact - a Baltimore City Police Officer named Harry J. Silk, Jr., assigned to the Northern District, whose wife's name listed in the said personnel folder was Lyn Silk. Your Affiant ascertained that Officer Silk resides at 8125 Hillendale Road and drove past the said residence and observed a 1966 Corvette parked in front of Officer Silk's residence. A check of Department of Motor Vehicle records indicate that the said 1966 Corvette automobile bearing license number FPB 348 is listed to Harry J. Silk, Jr. A check of the telephone records of the Chesapeake and Potomac Telephone Company indicate that the telephone number 296-7685 is listed to Thomas Monroe Walton, 31 Solar Circle, Baltimore County, Maryland.

On August 7, 1975, at the request of your Affiant, William W. Monroe was given a polygraph examination by the polygraph operator of the Baltimore City Police Department. Your Affiant was advised by the said operator of the polygraph machine that William W. Monroe passed the polygraph

machine indicating that the information he had given to your Affiant was truthful.

Your Affiant also took a written statement from the said William W. Monroe, a copy of which is attached hereto and incorporated herein.

It is felt by your Affiant that based on his investigation, a meeting will take place on August 7, 1975, at approximately 5:30 P.M. at the home of Thomas Walton, 31 Solar Circle, Baltimore County, Maryland, between William W. Monroe, Thomas Walton, Lyn Silk and/or other persons involved in the said conspiracy to commit murder, etc.

It is felt by your Affiant that the recording of any possible conversations between the above-named parties would be of valuable assistance in the gathering of information and/or evidence concerning the conspiracy to commit the homicide of one Harry J. Silk, Jr.

Your Affiant further believes that all other conventional investigative methods of obtaining evidence and information relative to the conspiracy to commit the murder of Harry J. Silk, Jr. would be unsuccessful, as the only parties who will be present during the conversation which will take place on August 7, 1975, in the evening hours will be William W. Monroe, Thomas Walton, Lyn Silk and/or other persons involved in the said conspiracy to commit murder, etc.

It is further believed by your Affiant that the integrity of the said William W. Monroe and his future testimony can only be protected and upheld by the said electronic recording methods.

Your Affiant, on the basis of his aforesaid knowledge and experience, respectfully requests that this Honorable Court issue an Ex Parte Order for the electronic device, instrument, apparatus or equipment to be used so that the conversations between the above-stated parties can be recorded.

/s/ DETECTIVE RICHARD J. ELLWOOD,
AFFIANT

APPENDIX D

AFFIDAVIT

Your affiant, Det. *Douglas C. Freburger* is a duly constituted member of the Baltimore County Police Department and has served on the Police Force of Baltimore County for approximately eleven years. Your affiant has been assigned to the Baltimore County Police Department Narcotic Squad since January 1973 and during that period of time spent eleven months on Special Detail with the Drug Enforcement Administration Special Task Force. Prior to assuming thise position your affiant was assigned to the Intelligence Division of the Baltimore County Police Department for eight and one half years. Your affiant has attended numerous in-service training sessions and schools since joining the police department and has participated in various narcotics and conspiracy investigations totaling more than one hundred.

On August 7, 1975, your affiant was contacted by Baltimore City Police Department detectives and advised of the conspiracy to commit the murder of Harry J. Silk, Jr. Your affiant was advised that one William W. Monroe had given information to the Baltimore City Police Department involving one Thomas Monroe Walton contacting the said Monroe about obtaining a person to kill a Baltimore City Police Officer by the name of Harry J. Silk, Jr. at the request of the said police officer's wife Lyn Silk.

Your affiant was further advised that a meeting was scheduled to take place at the home of Thomas Walton, located at 31 Solar Circle in Baltimore County, Maryland at ap-

proximately 5:30 P.M. on August 7, 1975.

Your affiant being familiar with the said Thomas Walton verified that he does in fact live at 31 Solar Circle in Baltimore County, Maryland. The affiant from his prior experiences is also aware that the said Thomas Walton is and has been involved in criminal activities particularly narcotics violations. Your affiant also is aware that the said Thomas Walton has a prior record both with Baltimore City and Baltimore County and has been convicted of various crimes.

Your affiant when being advised that William Monroe Walton telephoned 296-7685 and spoke to Walton, checked with the C & P Telephone Company and verified that the above telephone number is listed to Thomas Monroe Walton, 31 Solar Circle. Your affiant further asserts that the said William Monroe has in the past given information to him and other detectives of the Baltimore County Police Department which has been corroborated and lead to the arrest of two people, both waiting trial in the Circuit Court of Baltimore County. That further, based on the information given to your affiant and other detectives of the Baltimore County Police Department, seven and one half grams of heroin, stolen guns and other Controlled Dangerous Substances have been recovered.

It is felt by your affiant that after receiving the above information that a meeting will take place of the home of Thomas Monroe Walton, 31 Solar Circle, Baltimore County, Maryland at approximately 5:30 P.M. on August 7, 1975 between William Monroe, Thomas Walton, Lyn Silk, and/or other persons involved in the conspiracy to commit the murder of Harry J. Silk, Jr.

It is felt by your affiant that recording of any possible conversations between the above noted parties would be of valuable assistance in the gathering of information and/or evidence concerning the conspiracy to commit the homicide of the said Harry J. Silk, Jr.

Your affiant further believes that all other conventional investigative methods of obtaining evidence and information relative to the conspiracy to commit the homicide of Harry J. Silk, Jr. would be unsuccessful as the only parties who will present during the conversation which take place on August 7, 1975 in the evening hours will be William Monroe, Thomas Walton, Lyn Silk and/or other persons involved in the said conspiracy to commit murder, etc.

It is further believed by your affiant that the integrity of the said William Monroe and his future testimony can only be protected and up held by the said electronic recording method.

Your affiant, on the basis of his aforesaid knowledge and experience, respectfully request that this Honorable Court issue Ex Parte Order for the electronic device, instrument, apparatus or equipment to be used so that the conversations between the above-stated parties can be recorded.

/s/ Det. Douglas C. Freburger
Affiant

APPENDIX E

EX PARTE ORDER AUTHORIZING EAVESDROP

Upon reading the Application presented by Sandra A. O'Connor, State's Attorney for Baltimore County, the principal prosecuting attorney for Baltimore County, Maryland, said Application sworn to this 7th day of August, 1975, made pursuant to the provisions of Article 27, Section 125A of the Annotated Code of Maryland, and

Upon reading the Affidavits of Detective Richard J. Ellwood, Jr., Detective Douglas C. Freburger, and William W. Monroe, sworn to this 7th day of August, 1975, it appears to this Honorable Court that from the facts averred in the Petition aforesaid and in the Affidavits which are attached thereto and the contents of which are incorporated therein by reference.

That there is probable cause to believe that the crimes enumerated in said Petition, to wit: Conspiracy to commit the murder of Harry J. Silk, Jr., the murder of said individual, and Conspiracy to conceal the identities of those persons who participated in the murder; and

That the use of the hereinbelow-specified oral communications are necessary and essential in order to gain evidence of the commission of the aforesaid crimes;and

That such evidence cannot otherwise be obtained by alternative investigative procedures as these procedures appear to be unlikely to succeed and appear to pose a danger to the

That such electronic interception is necessary and essential in order to insure the safety and protect the integrity of the said William W. Monroe when he comes into contact with the hereinbelow-described persons, whose communications are to be intercepted; and

That there are exigent circumstances in this case of such a nature that, if either prior or simultaneous notice of the authorization for the electronic interception and recording would be given to the hereinbelow-described individuals, the purpose and the objective of the investigation would thereby be frustrated and that such notice would affirmatively serve to facilitate the commission of the crimes set forth in the Petition; and

That the facts and circumstances recited in the Petition and Affidavits aforesaid furnished a proper legal basis for the issuance of the prayed for Ex Parte Order and justify the degree of the limited action specifically authorized.

NOW, THEREFORE, it is this 7th day of August, 1975, by the Circuit Court for Baltimore County,

ORDERED that the Petitioner, the principal prosecuting attorney for Baltimore County be and she is hereby authorized and directed, with necessary assistance from members of her legal and investigatory staff and members of the Baltimore City Police Department and the Baltimore County Police

Department designated by her to use the following specified electronic listening and recording devises, to wit:

An AID TX780 Transmitter, serial number 0159 – Special Operations group SK-9B Receiver, serial number 14 with built-in Sony Tape Recorder, consisting of:

1. A body transmitter with a battery attached to be physically placed upon the person of William W. Monroe for the purpose of transmitting his oral conversation with the said Lyn Silk, Thomas Walton and/or other persons involved in said conspiracy to commit murder, etc.

2. A receiver attached to a tape recorder, with attachments, for the purpose of receiving and recording the oral conversations of the above-named individuals which will be transmitted from the body transmitter physically placed upon the person of William W. Monroe.

3. A small tape recorder with a microphone attached, to be also placed physically upon the person of William W. Monroe for the purpose of recording his oral conversation with the said Lyn Silk, Thomas Walton and/or other persons involved in said conspiracy to commit murder, etc.; this recorder to be used as a precaution in case the conversation goes outside the range and scope of the body transmitter/receiver receiving range; and it is further

ORDERED that the electronic eavesdropping and recording is to be conducted by the following named Officers and those persons operating under their immediate direction, including the following-prescribed method, to wit:

1. Intercepting the oral conversations on the receiver between William W. Monroe and Lyn Silk, Thomas Walton and/or other persons involved in said conspiracy to commit murder, etc., which are transmitted by the body transmitter and recording same on the tape recorder.

2. Physically placing the small tape recorder on the person of William W. Monroe for his meeting with Lyn Silk, Thomas Walton and/or other persons involved in said conspiracy to commit murder, etc., and the removal of same after the meeting, said device to be preserved for future examination by this Honorable Court.

3. The electronic eavesdropping and recording will be conducted by Detective Douglas C. Freburger and his designees as well as the Petitioner using the methods of electronic eavesdropping and recording as have been described above, during the meetings between William W. Monroe and Lyn Silk, Thomas Walton and/or other persons involved in said conspiracy to commit murder, etc.; and it is further

ORDERED that the persons whose communications are to be intercepted and recorded shall be and the same are hereby particularly identified as follows:

LYNN SILK
WHITE FEMALE, DOB 9-6-45
APPROXIMATELY 5'5", 110 LBS.

THOMAS WALTON
WHITE MALE, DOB 9-17-52
APPROXIMATELY 5'10", 160 LBS.

and it is further

ORDERED that the use of the aforesaid electronic devices for purposes of interception and recording as aforesaid shall begin without prior or simultaneous notice to the party involved and above-described and said interception shall terminate as soon as necessary evidence is obtained and the objective of the interception is attained; and it is further

ORDERED that this Order shall take effect at 5:00 P.M., on Thursday, August 7, 1975, and shall remain in effect until 10:00 A.M., on Tuesday, August 12, 1975, at which time the authorization to intercept the above-described subjects' communications shall terminate; and it is further

ORDERED that every effort shall be made to intercept only those communications which reasonably may be expected to relate to the aforesaid crimes and that the operators of the aforesaid electronic devices and the supervisors in charge of the investigation shall make a diligent effort to minimize the interception of communications which are not otherwise subject to interception; and it is further

ORDERED that the Petitioner or her designee, shall as soon as this Order has been signed and sealed by this Honorable Court, promptly file a True Copy of the original papers, including said Application and Affidavits with the Clerk of the Circuit Court for Baltimore County, who shall keep them safely pending further Order of this Honorable Court and in compliance with the State law; and the Petitioner or her designee shall retain the original copy of the Order, Petition, Consent and Affidavits for official use; and it is further

ORDERED that no person gaining knowledge of either the existence of the Order, its contents or any actions taken pursuant to its execution shall thereafter divulge any such knowledge to any unauthorized person under penalty of contempt of this Honorable Court; and it is further

ORDERED that upon termination of the interception process as hereinabove specified, the Petitioner or her designee shall promptly make a Return of the aforesaid seizure and any and all tape recordings obtained pursuant to this Order, for the purpose of inventory at the direction and under the supervision of this Honorable Court, and for such further disposition – including notice to concerned parties– as are required by law; and it is further

ORDERED that the place where the aforesaid devices are to be used by and the same is hereby particularly described as follows: 31 Solar Circle, Baltimore County, Maryland, and wherever else the subjects might go to discuss the described crimes; and it is further

ORDERED that the authorization for interception of the conversations to be intercepted is for gaining evidence of the commission of violations of Conspiracy to commit murder to Harry J. Silk, Jr., the murder of said individual, and Conspiracy to conceal the identities of those persons who participated in the murder; and any evidence obtained pursuant to this Order shall be used solely in connection with an investigation into or prosecution of the aforementioned particularly-described crimes.

/s/ JUDGE
CIRCUIT COURT FOR
BALTIMORE COUNTY

Supreme Court, U. S.
FILED
OCT 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-210

THOMAS MONROE WALTON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS B. BURCH,
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The Daily Record Co., Baltimore, Md. 21202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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THOMAS MONROE WALTON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENT

This Brief of Respondent in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Court dated September 27, 1978.

OPINIONS BELOW

The Order of the Court of Appeals of Maryland, reported at 282 Md. 514 (1978), dismissing the writ of certiorari as improvidently granted, is included as an Appendix to this Brief. The opinion of the Court of Special Appeals of Maryland, *Walton v. State,* No. 103

(Md. App., filed Oct. 24, 1977), is unreported and is included as Appendix A.1-A.7 of the Petition.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Did the trial judge properly deny Petitioner's motion to suppress a tape recording, made as a result of a "body tap," and the fruits derived therefrom where the order therefor was allegedly defective under 18 U.S.C. §§ 2510 *et seq.*?

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

In addition to those statutes reprinted in the Petition at 3-15, the following statutes and rules are involved:

Md. Ann. Code art. 27, § 125B

Courts Article of the Maryland Code, § 10-402(c)(2):

> "It is lawful under this subtitle for an investigative or law enforcement officer acting in a criminal investigation or any other person acting at the prior direction and under the supervision of an investigative or law enforcement officer to intercept a wire or oral communication in order to provide evidence of the commission of the offenses of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in controlled dangerous substances, or any conspiracy to commit any of these offenses, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception."

Courts Article of the Maryland Code, § 10-405:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this State, or a political subdivision thereof if the disclosure of that information would be in violation of this subtitle."

18 U.S.C. § 2511(c)(2)

STATEMENT OF THE CASE

Respondent accepts the facts as presented in Petitioner's Statement. Petition at 16 only.

ARGUMENT

THE PROVISIONS OF 18 U.S.C. §§ 2510 *ET SEQ.* ARE INAPPLICABLE TO THE INSTANT CASE BECAUSE THE INFORMANT CONSENTED TO THE PLACEMENT OF THE TRANSMITTER ON HIS PERSON. EVEN IF THE AFFIDAVITS AND ORDER DID NOT COMPLY WITH THE APPLICABLE STATUTE (THEN MD. ANN. CODE ART. 27, § 125A[1]), THE RECORDING AND FRUITS DERIVED THEREFROM WOULD NOT BE EXCLUDED BECAUSE "BODY TAPS" DO NOT GIVE RISE TO A FOURTH AMENDMENT PROBLEM.

18 U.S.C. § 2511(2)(c) provides:

> "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."[2]

---

[1] Repealed by 1977 Md. Laws, ch. 692, § 1, effective July 1, 1977. For present provisions as to wiretapping and electronic surveillance, *see* the Courts Article of the Maryland Code, §§ 10-401 *et seq.*

[2] *See* now Courts Article of the Maryland Code, § 10-402(c)(2).

In *Pennington v. State,* 19 Md. App. 253, 274 (1973), *cert. denied,* 271 Md. 742, *cert. denied,* 419 U.S. 1019 (1974), the Court of Special Appeals of Maryland noted that "[t]he federal act expressly exempts consensual and participant monitoring by law enforcement agents from the general prohibitions against surveillance without prior judicial authorization and permits the fruits to be received as evidence." Thus, the federal wiretap law is inapplicable to the instant case because the informant consented to the placement on his person of a transmitter so as to record the conversation between himself, Petitioner, and co-defendant.

Petitioner asserts, however, that there must be compliance with 18 U.S.C. §§ 2510 *et seq.* in the instant case. The Court of Appeals of Maryland noted in *State v. Siegel,* 266 Md. 256, 272 (1972):

> "The Maryland statutes concerned with the interception of wire or oral communications are Code (1957, 1971 Repl. Vol.), Art. 27, §§ 125A-D . . . . These provisions are 'applicable State statute[s]' as envisioned under [18 U.S.C.] § 2516(2) and whether each of their terms relating to the application or grant of an order is constitutional *vel non* is of no consequence. Once the hurdle of finding an applicable Maryland law authorizing interception is overcome, compliance must be had with whichever law is more constricting, be it federal or state."

Similarly, in *Pennington, supra* at 277 n.14, the Court of Special Appeals noted:

> "If the State statute be more restrictive than the federal act so as to prohibit participant monitoring by electronic devices, then the interception of communications in such circumstances would be lawful only if under the authority of an order which, although contemplated by the State statute, § 125A(b), must comply with the more restrictive dictates with respect to such orders of the federal act."

It is clear, however, that determination of which statute is more restrictive and compliance with the more restrictive provisions of both are unnecessary where one statute, herein, as in *Pennington,* 18 U.S.C. §§ 2510 *et seq.,* is inapplicable because of an exemption under § 2511(2)(c):

> "We have found that the recording of the communications . . . was neither constitutionally proscribed nor prohibited by the federal act. It would be illegal, therefore, only if the State statute made it so. There is no need, however, for us to determine whether Code, Art. 27, § 125A, *et seq.,* is more restrictive than the federal act so as to forbid participant monitoring." *Pennington v. State, supra,* at 276-77 (footnote omitted).

Because the "body tap" in the instant case is exempted by 18 U.S.C. § 2511(2)(c) from compliance with §§ 2510 *et seq.,* the cases on which Petitioner relies for the proposition that a statement of other investigatory techniques is required under §§ 2518(1)(c) and (3)(c) (Petition at 8, 10), and that the order state, pursuant to 18 U.S.C. § 2518(5) (Petition at 11), that execution is to be as soon as practicable — *United States v. Giordano,* 416 U.S. 505 (1974); *United States v. Curreri,* 388 F. Supp. 607 (D. Md. 1974) — are inapplicable.

Thus, it is only necessary to examine the "body tap" herein in relation to the Maryland statute which authorized it. Petitioner urges that the recording and all fruits derived therefrom should have been excluded because the affidavits in support of the application for the "body tap" did not contain a statement as to other investigatory techniques, required by 18 U.S.C. §§ 2518(1)(c) and (3)(c), and the order did not state, pursuant to 18 U.S.C. § 2518(5), that execution was to be as soon as practicable. These allegations have no merit because the federal statute, as noted above, is inapplicable in the instant case and because then Md. Ann. Code

art. 27, § 125A (Petition at 3-5) did not contain such requirements.

Then Md. Ann. Code art. 27, § 125B provided for a criminal penalty, rather than exclusion of evidence, where § 125A was violated:

> "Any person or persons who shall use any electronic device or equipment or other devices or equipment of any type whatsoever, in such manner as to overhear or record any part of the conversation or words spoken to or by any person in private conversation, without their knowledge or consent, either expressed or implied, except in compliance with the terms of this subtitle, shall be deemed guilty of a misdemeanor, subject, upon conviction, to a fine not exceeding five hundred dollars ($500), or to imprisonment for not exceeding one (1) year, or to both such fine and imprisonment, in the discretion of the court. Nothing herein contained shall be construed or implied to affect any employee of a telephone company or a telegraph company, as those terms are defined in Article 78 of the Annotated Code of Maryland, while in the regular course of his employment by such company, and engaged in company business."

The rationale for not providing the remedy of exclusion is that, as noted in *Pennington v. State, supra,* participant monitoring involves no violation of the Fourth Amendment guarantee against unreasonable searches and seizures. This Court explained the rationale in *United States v. White,* 401 U.S. 745, 751-52 (1971):

> "Concedely a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. . . . For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person. . . .; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. . . . If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness and defendant necessarily risks.
>
> Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. Very probably, individual defendants neither know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. Otherwise, conversation would cease and our problem with these encounters would be nonexistent or far different from those now before us. Our problem . . . is what expectations of privacy are constitutionally 'justifiable' — what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants. . . . If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case. . . .
>
> Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts

> their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his. In terms of what his course will be, what he will or will not do or say, we are unpersuaded that he would distinguish between probable informers on the one hand and probable informers with transmitters on the other. Given the possibility or probability that one of his colleagues is cooperating with the police, it is only speculation to assert that the defendant's utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound. At least there is no persuasive evidence that the difference in this respect between the electronically equipped and the unequipped agent is substantial enough to require discrete constitutional recognition, particularly under the Fourth Amendment which is ruled by fluid concepts of 'reasonableness.'" (Citations omitted).

See Hoffa v. United States, 385 U.S. 293 (1966); *Lopez v. United States,* 373 U.S. 427 (1963); *On Lee v. United States,* 343 U.S. 747 (1952). Moreover, under § 125B, even if § 125A did contain the requirements to which Petitioner alludes, the remedy for non-compliance would not have been exclusion.[3] *See Reed v. State,* 35 Md. App. 472 (1977), *rev'd on other grounds,* No. 62 (Md., filed Sept. 6, 1978); *Pennington v. State, supra.*

[3] 18 U.S.C. § 2518(10)(a) (Petition at 14-15) provides, in pertinent part, however, that the remedy for a violation is suppression. *See, e.g.,* United States v. Giordano, *supra*; now Courts Article of the Maryland Code, § 10-405.

CONCLUSION

For the foregoing reasons and because (1) the repeal of Md. Ann. Code art. 27, § 125A (*see* n.1, *supra*), and (2) the enactment of an exemption for participant monitoring under now Courts Article of the Maryland Code, § 10-402(c)(2) (*see* n.2, *supra*) render this case not within the contemplation of Sup. Ct. R. 19, the Court of Appeals properly dismissed the writ of certiorari, and Respondent prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

In The
Court of Appeals of Maryland

September Term, 1977

(No. 137)
Thomas Monroe Walton
v.
State of Maryland

(No. 138)
Lyn Jayne Silk
v.
State of Maryland

ORDER

The petitions for certiorari not having disclosed that the pertinent Maryland statute, controlling in these cases, Maryland Code (1957, 1976 Repl. Vol.), Article 27, § 125A, had been repealed by Chapter 692 of the Acts of 1977, effective July 1, 1977; and

The State having filed no answer in opposition to the petitions for a writ of certiorari pointing out the fact that § 125A had been repealed; and

It appearing, in view of the repeal of § 125A, that these cases do not involve the public interest within the contemplation of § 12-203 of the Courts and Judicial

Proceedings Article; therefore, it is this 8th day of May, 1978

ORDERED, by the Court of Appeals of Maryland, that the writs of certiorari be, and they are hereby, dismissed, petitions having been improvidently granted; and it is further

ORDERED that the State of Maryland shall pay all costs in these proceedings.

/s/ ROBERT C. MURPHY,
Chief Judge.